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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 262. [redacted] 9

THOMAS P. ALDER,

Petitioner,

versus

WILLIAM EDENBORN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

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Supreme Court of the United States,

OCTOBER TERM, 1914,

No. 262.

THOMAS P. ALDER,
Petitioner,

AGAINST

WILLIAM EDENBORN,
Respondent.

Brief for Respondent.

Statement of the Case.

This case comes here on a writ of *certiorari* to the United States Circuit Court of Appeals for the second circuit, granted September 27, 1913 (Tr. page 181), to review the judgment of the Circuit Court of Appeals entered on July 7th, 1913 (Tr., p. 179) reversing a judgment of the United States District Court for the Eastern District of New York in favor of the plaintiff for the sum of $16,739.01 entered upon the report of a referee appointed under a stipulation waiving a trial by jury (Tr., fols. 224-227).

The action is at law to recover certain sums of money claimed to have been obtained from peti-

tioner (plaintiff below) by defendant's fraud in inducing plaintiff to take a $10,000 interest in a syndicate agreement; it was commenced in the Supreme Court of Kings County, State of New York, and afterwards removed to the United States Circuit Court, Eastern District of New York, on the ground of diverse citizensip (Tr., fol. 36). The complaint alleges that from the 15th day of April, 1902, until the first day of January, 1903, defendant was engaged in promoting, forming and carrying out a syndicate agreement to purchase, develop and dispose of certain lands and properties and for the purchase of the United States Iron Company of New Jersey, capitalized at $1,000,000, and its properties, and for this purpose prepared a syndicate agreement, appointing defendant and J. C. Walker and August Mann, syndicate managers (this syndicate agreement is set out at folio 127 of the transcript); that the defendant solicited plaintiff to become a subscriber to said syndicate agreement (fol. 15); that as an inducement to subscribe, it was represented and stated in said agreement that an opportunity was afforded to acquire for a cash consideration, the ownership, control and possession of the United States Iron Company of New Jersey, capitalized at $1,000,000, at par (fol. 17); that plaintiff, relying upon the truth of the statements made by defendant consented to become a subscriber to said syndicate agreement in the sum of $10,000 (fol. 22) and on or about the 17th day of December, 1902, paid defendant the sum of $10,136.08, being the amount of said subscription and the interest thereon (fols. 22-23). The complaint further alleged that at the time defendant procured plaintiff's consent to become a subscriber, the defendant was the owner of 5,365 out of a total of 9,250 shares of the stock in the United States Iron

Company (fol. 17) and fraudulently and wrongfully concealed from plaintiff the fact that he owned a majority of the capital stock of said United States Iron Company and controlled it (fol. 18); the complaint further alleged that under the syndicate agreement defendant occupied a relation of trust and confidence to the subscribers and it was his duty to make to them a full disclosure of all the facts and circumstances within his knowledge necessary to enable the subscribers to form an independent judgment and protect their interests; that plaintiff had unlimited confidence in and relied on and trusted the defendant to the fullest extent (fol. 14); that after the payment of the amount of his subscription defendant received a certificate for 100 shares of stock in the Sheffield Coal and Iron Company in the name of Caroline E. Alder and was notified by the defendant that he had been made a subscriber to said syndicate agreement (fol. 23) that the plaintiff after discovery of the fraud, deceit and fraudulent concealment practiced on him by defendant, notified the syndicate managers, including the defendant, that he elected to rescind his subscription to said agreement and offered to return the said certificates of stock to the defendant and demanded of the defendant the payment of the money which had been paid to the defendant on the subscription agreement which demand was refused; that plaintiff was ready and willing to deliver said certificates and to receive back the money paid the defendant (fols. 29-30).

A demurrer to the complaint (fol. 39) was sustained on the ground (1) that it did not state facts sufficient to constitute a cause of action (2) that there was a defect of parties in that the co-syndicate managers were not made defendants (3) that the corporation whose stock was transferred was

not made a party defendant (4) that the complaint included in one cause of action the allegations of an action in equity to rescind the contract and the allegations of an action at law to recover damages for fraud and deceit (fol. 45). Thereupon plaintiff amended his complaint but the only substantial change made was the addition of a paragraph stating that the stock of the Sheffield Coal and Iron Company was worthless (fols. 72-73). The defendant demurred to the amended complaint and the same judge who passed on the first demurrer held that the complaint stated a cause of action at law based on a rescission of the contract and overruled the demurrer. An order overruling the demurrer was entered which provided (1) that the complaint stated facts sufficient to constitute a cause of action (2) that there was no defect of parties defendant (3) that the complaint stated a cause of action based on the rescission of a contract alleged to have been procured by fraud (fol. 81). Interlocutory judgment was entered overruling the demurrer (fol. 86). The defendant in his answer (fol. 89) denied the material allegations of the amended complaint except that defendant admitted the execution of the syndicate agreement which was annexed to the answer as an exhibit (fol. 127). The parties by stipulation referred the issues of law and fact to Edward W. Hatch, Referee to hear and determine and an order was accordingly entered (fols. 166-171).

After the trial the referee made a report finding that in 1902 the defendant in connection with others, conceived a scheme to consolidate the United States Iron Company and other iron ore properties, erect blast furnaces for smelting iron ore and manufacture pig iron and for this purpose prepared the syndicate agreement which is set out at folio 127 of the transcript (fol. 176); that be-

fore the syndicate agreement had been fully underwritten or subscribed, the defendant and plaintiff had a conversation about the plaintiff making a subscription thereto; that at that time, plaintiff was short of funds and was unable to furnish the money to pay for the stock, so he did not then subscribe to the said syndicate agreement; that after the subscription for all the stock had been made, plaintiff and defendant again met and plaintiff requested the defendant to procure him some of the subscribed stock which the defendant undertook to do; that the defendant subsequently procured from Mr. Ellwood, a syndicate subscriber, a part of his subscription and thereafter procured the stock and delivered the 100 shares thereof to the plaintiff for which he paid the subscription price of $10,000 to which was added the sum of $138.08 interest to place the plaintiff upon the same footing as to cost with those who had actually subscribed to the syndicate agreement (fols. 177-178); that defendant, did not at any time disclose to the plaintiff his ownership in the stock of the United States Iron Company or that he had any pecuniary interest therein and that plaintiff was not informed of defendant's interest in the United States Iron Company at or prior to the purchasing said stock and did not acquire such information until a considerable time thereafter (fol. 180); that it became and was the duty of the defendant at or prior to the procuring of part of Ellwood's subscription and prior to making the sale of said stock to the plaintiff to make full and complete disclosure of his interest in the United States Iron Company (fol. 181); that after the proposed consolidation provided for in the syndicate agreement had been made, plaintiff learned of the defendant's interest in the United States Iron Company (fol. 182). He then

elected to rescind his purchase of such stock and gave notice of such fact to the syndicate managers and offered at that time to restore and return the stock which he had received and demanded the return of the money which he had paid therefor (fol. 182); that the defendant and the syndicate managers each refused to accept the return of said stock and refused to refund the plaintiff his money (fol. 183); that the plaintiff has not been guilty of laches in asserting his claim (fol. 183). The referee found as a conclusion of law that it was the duty of defendant at or prior to procuring a part of Ellwood's subscription and prior to making the sale of said stock to plaintiff to make a full and complete disclosure to plaintiff of defendant's interest in the United States Iron Company (fol. 184) and that defendant's failure to make such disclosure operated in law as a fraud upon plaintiff (fol. 185); that the plaintiff was entitled to recover from the defendant the sum of $10,138.08 with interest aggregating $15,942.08. The referee also found that at the time of the formation of the syndicate, the United States Iron Company was the owner of valuable iron properties in and about Sheffield, Alabama (fol. 236); that defendant made no statements to the plaintiff with intent to deceive, defraud or mislead (fol. 241) that defendant had not intentionally concealed from plaintiff his interest in the United States Iron Company or his ownership of stock therein (fols. 246, 247, 255); that plaintiff did not sign the syndicate agreement (fol. 253); that plaintiff, prior to the transaction in question, had heard of the United States Iron Company (256); that at the time of the formation of said syndicate the defendant believed that the operations of the company which was to succeed the syndicate would be profitable (fol. 237); that the defendant subscribed to said syndicate the

sum of $500,000 which was subsequently reduced to $475,000 (fol. 242) that defendant exchanged the stock of the United States Iron Company theretofore held by him for new stock of the same company with its name changed and on the exchange the old stock was figured at a valuation of $70 per share and the difference between this amount and the amount of his subscription, the defendant paid in cash (fol. 243); that the defendant's interest in the United States Iron Company at the time of the formation of the syndicate was known to a number of persons interested in the Iron and Steel industry and that the same has been the subject of publication in the "Iron Age" the standard iron and steel trade paper of September 18, 1902 (fol. 246); that the plaintiff knew that the defendant was largely interested in the formation of the syndicate and in carrying out its objects and purposes (fol. 247); that all of the managers of the syndicate acted in carrying out the syndicate agreement and that the subscription of the plaintiff was paid to and received by all of said managers as such (fol. 450); that at a meeting of the stockholders of the Sheffield Coal and Iron Company held on June 9, 1903 at which the plaintiff was represented by proxy, the minutes of the last annual meeting of the stockholders of the United States Iron Company held on June 10, 1902 were read and approved (fols. 250-251); that the minutes of the meeting of the United States Iron Company held June 10, 1912 which were read at the meeting of the stockholders of the Sheffield Coal and Iron Company on June 9, 1903, showed defendant's ownership of the stock of the United States Iron Company (fol. 252) that in part payment of the defendant's subscription he transferred his 5365 shares of stock in the United States

Iron Company to the syndicate at $70 per share (fol. 294) that after the subscription by plaintiff the name of the United States Iron Company was changed to that of the Sheffield Coal and Iron Company and the stock of the Sheffield Coal and Iron Company increased from $1,000,000 to $2,500,000; that the defendant delivered to the plaintiff in return for the money which he had paid to him, stock of the Sheffield Coal and Iron Company at par for the exact amount of his subscription (fols. 303, 304), that on the 30th day of December, 1902, the syndicate managers directed the Sheffield Coal and Iron Company to distribute 25,000 shares of the Sheffield Coal and Iron Company's stock among the subscribers to the syndicate agreement in amount equal to the amount of their respective subscriptions (fols. 305-306) that the stock of the Sheffield Coal & Iron Company had become practically worthless (fol. 307).

The referee, following the opinion of the Court of Appeals in the case of Hecksher *v.* Edenborn, 203 N. Y. 210 held that the defendant's failure to disclose his interest in the United States Iron Company operated in law as a fraud on plaintiff and directed judgment in favor of the plaintiff for the amount sued for with interest.

It is clear from an examination of the findings of fact and from the opinion of the Court of Appeals that the court did not believe and did not find that the defendant was guilty of any actual fraud, but based his finding entirely on constructive fraud on the defendant's part in failing to disclose his interest in the United States Iron Co. at the time the plaintiff purchased an interest in said subscription agreement (see opinion of the Referee, fols. 200-202, 206, 207, 213). Judgment was entered denying defendant's motion for a new

trial (fol. 372) and in plaintiff's favor for the sum of $16,739.01 (fols. 224-227).

On writ of error the Circuit Court of Appeals held that the facts found by the referee did not support the judgment entered (Tr. p. 178); that defendant performed his duties as manager for and on behalf of the whole syndicate and not for and on behalf of any one subscriber; that he received the subscription of each subscriber on behalf of all and made the contemplated purchases and outlays on behalf of all and that when the defendant sold his stock in the United States Iron Company to the reorganized Sheffield Coal and Iron Company he sold it to that company as successor to the rights of all the subscribers to the syndicate; that if there was a constructive fraud on Edenborn's part in not informing his subscribers of his personal interest in the stock of the United States Iron Company the fraud was on the whole syndicate when the syndicate was proposed and on the reorganized Sheffield Coal and Iron Company when the purchase was made; that plaintiff could not restore the defendant to his original position by tendering him the stock, plaintiff had received in the reorganized company which stock represented a proportionate interest in other properties greatly exceeding in value the amount of the defendant's interest in the original capital of the United States Iron Company (Tr. pgs. 178, 179); that if the syndicate subscribers had any right of rescission that right must be worked out through the purchasing company; that because of the peculiar situation of this case no right of rescission existed in favor of the plaintiff (fols. 178, 179). Plaintiff thereupon applied to this court for a writ of certiorari which was granted.

Brief of the Argument.

FIRST: This case does not differ very materially from that of Sim against this respondent and presents the same questions. Respondent submits to the court herewith his brief of the argument in the case of Sim *v.* Edenborn.

SECOND: The judgment of the Circuit Court of Appeals should be affirmed.

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